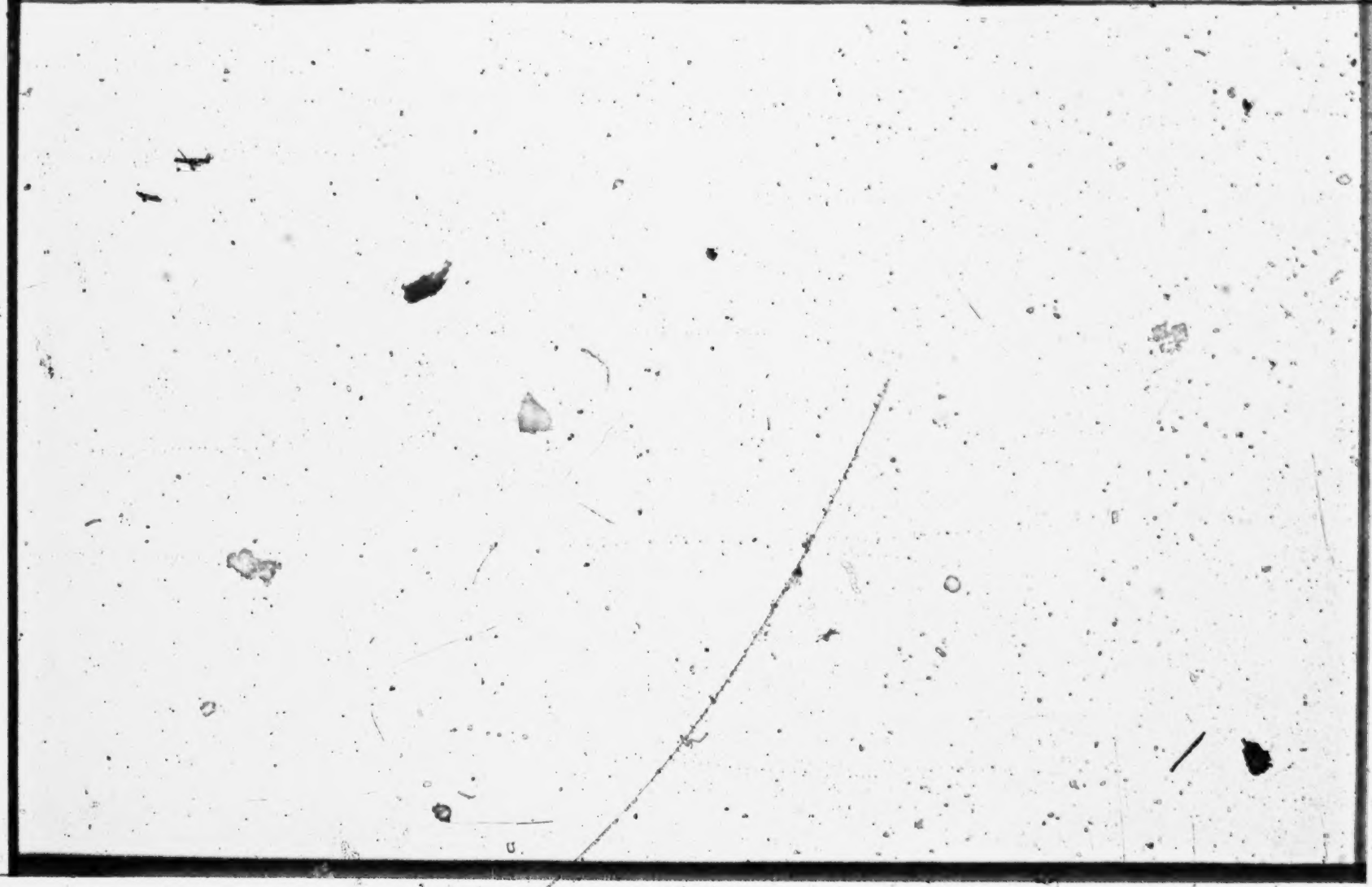

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No. 1376

IN THE

Supreme Court of the United States

October Term, 1967.

DAVID MILGRAM AND HIS ASSOCIATES,
Petitioners,

v.

OLD COLONY TRUST COMPANY, UNITED VENTURES, INC., GABRIEL POWERS, PENROSE INDUSTRIES CORPORATION, WILLIAM PENN BROADCASTING COMPANY, REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA, WILLIAM H. SYLK, HARRY S. SYLK, JONAS SENTER, SELMA KATZ, SAMUEL ROSENBLUM, SIMON ROSENBLUM, LEON J. OBERMAYER, Conservator, and WALTER E. HELLER & CO., INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit, affirming the order of the District Court for the Eastern District of Pennsylvania denying Petitioners' motion to intervene as of right, is reported at 387 F. 2d 939 and is printed in Appendix A to the Petition. The order and memorandum of the District Court is unreported and is printed in Appendix D to the Petition.

QUESTION PRESENTED.

Where the holder of pledged collateral has a right by reason of defaults to sell the collateral and, after two years' efforts to do so, has entered into an agreement to sell the same and brings a declaratory judgment action to have the agreement declared "commercially reasonable", as that term is defined under state law, does another potential offeror who enters a later bid to buy only a part of the collateral after the commencement of the action have standing to intervene in that declaratory judgment action as a matter of right?

STATEMENT OF THE CASE.

Respondents are or represent creditors of defendant, Penrose Industries Corp., in an amount in excess of $2,000,000. As security for this debt they hold in physical possession all of the capital stock of Penrose's wholly owned subsidiary, Wm. Penn Broadcasting Company (WPEN), and a certain debenture in the face amount of $1,980,000.

After default, notice and persistent efforts, respondents, in order to realize upon the above collateral, entered into an agreement with Martin W. Field for the sale of the stock and debenture in an amount subsequently found by the District Court in the proceedings in which petitioner was denied intervention, to be $4,853,345.69 cash [A-35 of Appendix H].

Since the selling creditors were in no position to give any guarantees or warranties, and because of the known presence of a series of junior lienors as well as a large body of unsecured creditors, respondents sought a declaratory judgment in the District Court for the Eastern District of Pennsylvania that the sale was commercially reasonable under the Uniform Commercial Code of Massachusetts.

Some four weeks after respondents entered into the agreement obligating respondents to sell to Field, and three weeks after filing of the declaratory judgment action, petitioners, a group calling themselves "Milgram Associates" tendered a written offer to purchase the stock of WPEN for the amount evaluated at trial to be equivalent to $4,868,410.00 subject to set-offs up to $1,980,000.00 [A-40 of Appendix H]. There was no offer to purchase the debenture, which the creditors were also selling.

The Trial Court denied petitioners' subsequent motion to intervene as of right under Federal Rule 24(a) as *party plaintiff*, without prejudice to its renewal after decision on the commercial reasonableness of the Field Agreement, and granting petitioners the status of amicus curiae.

Subsequently, trial was held on the issue of commercial reasonableness during which the Court heard evidence on and fully considered the petitioners' offer along with three other offers, all of which are evaluated in extenso in the opinion of the District Court printed in Appendix H to the

Petition for Writ of Certiorari, the evaluation appearing on A-36 through A-41 of Appendix H.

The Court upheld the commercial reasonableness of the Field Agreement. Appeals from this ruling have been taken by the debtor and others.[1]

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1. *Old Colony Trust Company, United Ventures, Inc. and Gabriel Powers v. Penrose Industries Corporation, et al.*, United States Court of Appeals for the Third Circuit, Nos. 17,211, 17,212, 17,213.

ARGUMENT.

The Petition does not present any important question concerning the Federal Rules of Civil Procedure or any other federal question. Petitioners' lack of standing to intervene was obvious, was routinely and correctly denied by the Trial Court, and routinely and correctly affirmed by the Third Circuit.

Petitioners are mere bidders for property, the subject of a prior binding agreement of sale between respondents and Field. They have no recognizable interest in that property whatsoever. On the contrary, Petitioners possess only an unenforceable desire to purchase property previously sold to another. As the Court of Appeals in its opinion succinctly stated:

> "Appellants concededly had no cognizable interest in the pledged property or the various financial transactions involving it before this action was commenced. They were legal strangers. Their only claim of 'interest' now is that they will pay more for the stock than Field has agreed to pay. As the district court noted, appellants' offer is clearly relevant to its determination of the issue of the commercial reasonableness of the plaintiff's agreement of sale with Field. Indeed, in connection with the pending decision in the district court of such issue, the judge has indicated that the appellants' offer will be considered. But even if the district court should find that the appellants' offer is higher in value than the amount reflected in the Field agreement, it would not follow that plaintiffs would thereby be subject to an enforceable legal duty to sell the collateral to appellants, putting aside other offers." [Appendix A, A-3.]

As the Court of Appeals also pointed out, the proceeding could not be converted into a judicially conducted auction sale; and even if the Petitioners had been permitted to intervene and had been able to persuade the Court of that which debtor's distinguished counsel could not; namely, the commercial unreasonableness of the Field agreement, there is no evidence that the respondent creditors (being under no legal compulsion to do so) would have accepted the Milgram offer.

It is beyond dispute that Petitioners' standing to intervene depends entirely upon the nature of their claimed interest in the collateral. The nature and extent of such a claimed interest in turn rests solely upon the rights of potential bidders for pledged collateral arising under state substantive law. The essential question raised by the Petition, therefore, is whether the courts below were correct that Petitioners have no rights, interests or other claims to the collateral under applicable state law. An "interested" buyer of collateral does not, by bidding for it, create for himself an "interest" therein.

Petitioners claim that the opinion below conflicts with the decision of this Court in *Cascade Natural Gas v. El Paso Natural Gas,* 386 U. S. 129, 87 S. Ct. 932 (1967). The Third Circuit disposed of this in a single sentence and rightly so. The parties there permitted to intervene under Rule 24 were the State of California and Cascade Natural Gas Co. whose interests in the disposition of assets pursuant to the divestiture decree, bears no resemblance to the interest of the Petitioners. However, in that very case in the lower court [*United States v. El Paso Natural Gas Co.,* 37 F.R.D. 330 (D. Utah 1965)] one of the parties who sought to intervene, Paradox Production Corporation, was interested in purchasing the assets, the divestiture of which was the subject of the proceeding. Significantly, the District Court's denial of the would-be purchasers' motion to intervene was

not disturbed on appeal. And in denying the motion, the District Court aptly said:

> "Paradox Production Corporation, whose claim rests upon the astonishing assertion that it is entitled to intervene because it wishes to purchase the assets of which El Paso is to be divested . . . as a would-be purchaser of the assets to be divested this applicant has no interest in the action . . . Our research has understandably failed to disclose any reported decision dealing with this type of claim to a right to intervene." 37 F.R.D. at 332, 339.

See also *United States v. Aluminum Co. of America*, 41 F. R. D. 342 (E. D. Mo. 1967).

Petitioners' assertion that the opinion below conflicts with the decision of Fifth and District of Columbia Circuits is equally without merit. *Atlantis Development Corporation v. United States*, 379 F. 2d 818 (5th Cir. 1967) was a suit by the United States to enjoin the erection of caissons by others on offshore coral reefs to which intervenor claimed *title* by reason of discovery and occupation. *Nuesse v. Camp*, 11 F. R. Serv. 2d 24a.2, Case 3 (D. C. Cir. 1967) was an action involving the authority of banks to engage in branching in Wisconsin and intervenor, the Commissioner of Banks of the State of Wisconsin, claimed a right and duty to enforce all Wisconsin laws relating to banking. The other cases cited by Petitioners are equally inapposite. The opinion below is not in conflict with the decisions of this or any other Federal Court.

Petitioners made no application for intervention under F. R. C. P. 24(b) although that section, dealing with permissive intervention requires application to be made. The first suggestion that the District Court should have permitted permissive intervention was made in the Court of Appeals. The proposition set forth in the footnote on Page 17 of the Petition, that the Court on its own motion must

consider intervention under F. R. C. P. 24(b) if it denies it under F. R. C. P. 24(a) is without support and the case cited with a "see" citation, *Wolpe v. Poretsky*, 144 F. 2d 505 (D. C. Cir. 1944) stands for no such proposition either in holding or dictum.

Notwithstanding petitioner's failure to make application under F. R. C. P. 24(b), the District Court *did* consider intervention under both sections of the rule, referring in its opinion to intervention "under F. R. C. P. 24", generally, and immediately thereafter citing the factor of additional time taken by additional parties and concluding [A-13]:

> "Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

Furthermore, the District Court in a supplement to its order of July 10 restated its reasons for denying intervention and quoted from a decision of the Court of Appeals for the Third Circuit dealing with permissive intervention [A-22]:

> "It is always a consideration against permissive intervention that additional parties 'take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objects, briefs, arguments, motions and the like. . . .'"

Thus, aside from the failure to apply for permissive intervention at District Court level, it is clear that the District Court nevertheless took into consideration the factors set fotrh in the rule as a standard of exercising its discretion to allow or deny permissive intervention, and having considered the additional delay which would have been involved, cannot be held to have abused the discretion given to it by F. R. C. P. 24(b).

CONCLUSION.

For the reasons stated the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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